

CHARLES KETCHUM ET AL.

IBLA 74-134

Decided June 26, 1974

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring the Little Chief No. 1 mining claim null and void for failure to make rental payment timely.

Reversed and remanded.

Accounts: Payments--Act of June 18, 1934-- Administrative Practice--Indian Lands:
Generally-- Mining Claims: Special Acts

Although the failure of a mining claimant to pay in advance the annual rental required by regulation 43 CFR 3825.1(b) for claims located pursuant to the Act of June 18, 1934, 48 Stat. 985, as amended by the Act of August 28, 1937, 50 Stat. 862, 863, within the Papago Indian Reservation is a sufficient basis for invalidating the claim, this regulation may be interpreted as directory and not mandatory.

Accounts: Payments--Act of June 18, 1934-- Administrative Practice--Indian Lands:
Generally-- Mining Claims: Special Acts

Tender of payment for annual rental on a mining claim located within the Papago Indian Reservation a few days after the due date but before action by BLM to declare the claim invalid under regulation 43 CFR 3825.1(b) may be accepted. Cancellation of the claim in such a circumstance is not compelled by the regulation.

APPEARANCES: Hle C. Tognoni, Esq., Phoenix, Arizona, for appellants; Fritz L. Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Charles Ketchum and Bessie Burnham appeal from a decision of the Arizona State Office, Bureau of Land Management, dated October 9, 1973, declaring the Little Chief No. 1 mining claim null and void for late payment of the annual rental fee of \$ 1.05. The claim, consisting of approximately 20 acres, is situated within the limits of the Papago Indian Reservation, Arizona.

Lands embraced by the Papago Indian Reservation were opened to mineral entry and location by the Act of June 18, 1934, 48 Stat. 984. The Little Chief No. 1 mining claim was located on July 14, 1952, by W. G. Burnham and Ed Ketchum, both since deceased. Although the Act of May 27, 1955, 69 Stat. 67, withdrew the Papago Indian Reservation from subsequent mineral location, any claims initiated prior thereto were not affected.

The Act of June 18, 1934, supra, called for the payment of "a yearly rental not to exceed five cents per acre * * * to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations." The applicable regulation, 43 CFR 3825.1(b), provides:

In addition to complying with the existing laws and regulations governing the recording of mining locations with the proper local recording officer, the locator of a mining claim within the Papago Indian Reservation shall furnish to the superintendent or other officer in charge of the reservation, within 90 days of such location, a copy of the location notice, together with a sum amounting to 5 cents for each acre and 5 cents for each fractional part of an acre embraced in the location for deposit with the Treasury of the United States to the credit of the Papago Tribe as yearly rental. Failure to make the required annual rental payment in advance each year until an application for patent has been filed for the claim shall be deemed sufficient grounds for invalidating the claim. The payment of annual rental must be made to the superintendent or other officer in charge of the reservation each year on or prior to the anniversary date of the mining location.

Appellants state the reason for their late payment of the rental was solely because of an oversight, which, when discovered, brought the immediate tender of payment, on July 23. They allege that the Little Chief No. 1 claim is a valid mining claim from which silica ores have been, and are being, mined, removed and sold at a profit.

The Solicitor, on behalf of the BLM, argues that the regulatory procedures were not complied with and such failure extinguishes the rights of the claimants, basing his argument on the stringent application of time limits imposed in contest proceedings.

Payment of rental for the Little Chief No. 1 claim was due on or before July 14, 1973. The payment was proffered, by check, on July 23. This payment was declined by the Papago Indian Agency on July 27, which returned the check with a statement that the account had been delinquent since July 14. On July 31, claimants tendered payment of the delinquent amount plus prepayment for the next 24 years. The Papago Indian Agency refused to accept this tender and returned the check. By letter of August 3, the Papago Agency requested BLM to initiate action to declare the Little Chief No. 1 claim null and void pursuant to 43 CFR 3825.1(b).

This Department, on two occasions, in Mrs. Frances S. Warner, A-28265 (June 2, 1960), and in I. M. Clausen, 7 IBLA 286 (1972), has dealt with cases arising under the Act of June 18, 1934, supra, and the regulation quoted above. Warner dealt with a payment of annual rental late by only one or two days. In his reversal of the BLM holding that the mining claims were null and void because of the late rental payment, the Deputy Solicitor said in Warner:

It is clear that the regulation calls for payment of the rental annually on or before the anniversary date of the location of a mining claim. However, although the second sentence quoted states that the annual rental "must" be paid on or prior to the anniversary date, the first sentence states only that failure to pay in advance "shall be deemed sufficient ground for invalidating the claim." Thus, on the whole, the regulation does not require that invalidation of the claim shall be the penalty inevitably applied in every instance of late payment. Accordingly, on its face the regulation may be interpreted to be directory and not mandatory.

After reciting that the record disclosed acceptance by the Papago Indian Agency of late rental payments from Mrs. Warner on at least two prior occasions, the Deputy Solicitor then said:

While the failure of officials of the Bureau of Indian Affairs to require prompt payment of rentals in the past could not operate to change the terms of a plain regulation, it indicates that previous to 1959, the regulation was not construed as one requiring the invalidation of mining claims in the Papago Reservation for late payment of rentals. I am unaware of any basis for a changed construction of the regulation now and see no reason why, in the circumstances

of this case, which indicate that the payment for 1960 was received only a day or two at most after the commencement of the rental year, invalidation of the claims should be imposed as a penalty for the appellant's late payment of rental.

In Clausen, this Board affirmed the holding by BLM that mining claims in the Papago Indian Reservations were null and void where the rental payment was not submitted until several months after the due date and subsequent to initiation of action by BLM to declare the claims null and void for nonpayment of rental, and where no explanation was offered for the delay in payment. The present situation is distinguishable from Clausen in that the payment here was tendered within a few days after the due date and before any action had been initiated to declare the claims null and void for failure to pay the rental due. We find that the case before us falls within the posture of Warner, which precedent we will follow here.

Therefore, under the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we reverse the decision of the Bureau of Land Management that the Little Chief No. 1 lode mining claim is null and void, and remand the case to BLM for action not inconsistent herewith.

Douglas E. Henriques
Administrative Judge

We concur.

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

